

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Implementation of Section 4(g) of the)	MB Docket No. 93-8
Cable Television Consumer Protection)	
and Competition Act of 1992)	
)	
Home Shopping Station Issues)	

**REPLY COMMENTS OF HOME SHOPPING NETWORK, INC.
IN RESPONSE TO PUBLIC NOTICE DA 07-2005**

Home Shopping Network, Inc. (“HSN”), a subsidiary of IAC/InterActiveCorp, timely filed Comments 1/ by and on behalf of its subsidiaries in response to the Commission’s *Public Notice* in the above-captioned proceeding. 2/ After reviewing the comments filed by other entities in response to the *Public Notice*, HSN hereby submits these Reply Comments.

I. INTRODUCTION

In the *Public Notice*, the Commission announced that it is seeking public input regarding a handful of issues that were raised in a petition for reconsideration filed nearly 14 years ago by Media Access Project on behalf of the Center for the Study of Commercialism (“CSC”) 3/

1/ Comments of Home Shopping Network, Inc. In Response to Public Notice DA 07-2005, MM Docket No. 93-8 (July 18, 2007) (“HSN Comments”). For convenience, HSN and its subsidiaries are referred to collectively herein as “HSN.”

2/ Public Notice, Commission Seeks to Update the Record for a Petition for Reconsideration Regarding Home Shopping Stations, MM Docket No. 93-8, DA 07-2005 (rel. May 4, 2007) (“*Public Notice*”).

3/ Petition for Reconsideration of Center for the Study of Commercialism, MM Docket No. 93-8 (Aug. 23, 1993) (“Petition for Reconsideration”).

arising out of the Commission's *1993 Report & Order* on home shopping station issues. ^{4/} In the HSN Comments, HSN explained that the Commission is barred by statute from either reconsidering its findings or updating the record in Docket Number 93-8 and that the record established in 1993 is sufficient to address—and dismiss—the issues raised in CSC's Petition for Reconsideration. Also, HSN endeavored to provide the Commission with information regarding the current status of home shopping stations in the HSN Comments, as the Commission had requested in the *Public Notice*. The HSN Comments show that, as attested to by viewers of HSN, home shopping programming continues to provide valuable public interest benefits to consumers.

In addition to the HSN Comments, several other comments were filed in response to the *Public Notice*. The *Public Notice* explained that “the Commission would like to update the record for this proceeding before ruling on the petition [for reconsideration filed by CSC].” Nevertheless, CSC did not participate and its counsel now is representing other parties in this matter, raising the issue as to whether CSC is still (a) in existence and/or (b) prosecuting the Petition for Reconsideration. ^{5/}

As further set forth herein, those commenters seeking reconsideration of the Commission's determination that home shopping stations serve the public interest (none of whom timely sought reconsideration in 1993) did not limit themselves in their comments to the requests made by the Commission in the *Public Notice* but instead assert new arguments, including those entirely outside the scope of this limited proceeding. Other commenters properly observed that

^{4/} Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, Home Shopping Station Issues, MM Docket No. 93-8, Report and Order, 8 FCC Rcd 5321, 5328 [¶ 36] (1993) (“*1993 Report & Order*”).

^{5/} A 2001 *Chicago Tribune* article states that CSC had closed down several years earlier. See S. Johnson, “*Placement, everyone, Ads move to center stage as the wall between content and commerce falls -- and an entertainment era ends,*” *Chicago Tribune* (Jun. 27, 2001), 2001 WLNR 10609454.

reconsideration or reopening of the proceeding would be impermissible given Congress’s specific statutory time limit for a Commission determination.

For the reasons described in the HSN Comments and these Reply Comments, it is clear that the Commission must reaffirm the conclusion it reached in 1993—that home shopping stations serve the public interest—and deny CSC’s Petition for Reconsideration.

II. THE COMMISSION IS BARRED AT THIS TIME FROM RECONSIDERING ITS 1993 DECISION OR FROM RE-OPENING THE RECORD

In 1993, the Commission thoughtfully analyzed the three statutory factors identified in Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, as it was directed to do so by Congress, and explained its reasoning in its *1993 Report and Order*. While it is unclear what prompted the Commission to release the *Public Notice* on the 14-year-old Petition for Reconsideration now, it is clear that the *Public Notice* was not the result of Congress either (i) authorizing the broadening of the scope of the Commission’s inquiry in MM Docket No. 93-8 or (ii) directing the Commission to re-open the proceeding over 5000 days after the statutory inquiry period closed.

A. Matters Raised in Some Comments Are Outside the Scope of This Limited Proceeding

The Commission made it clear in the *Public Notice* that comments were being solicited only as to the issues raised in CSC’s Petition for Reconsideration and limited, specific factual updates. ^{6/} Nevertheless, some commenters belatedly now seeking reconsideration of the *1993 Report and Order* did not limit themselves to the *Public Notice* requests but instead assert new grounds for reconsideration, including those entirely outside the scope of this limited proceeding, such as must-carry obligations. ^{7/}

^{6/} *Public Notice* at ¶¶ 6-8.

^{7/} See, e.g., Comments of Cablevision Systems Corp. in MM Docket No. 93-8, at 11-18 (July 18, 2007) (“Cablevision Comments”) (arguing that must-carry of home shopping stations

This simply is not the appropriate proceeding for a must-carry debate. As set forth in the HSN Comments, the Supreme Court has stated that it is “axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” ^{8/} Here, Congress delegated to the Commission only the power to “determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity.” ^{9/}

There is no room under this clear and circumscribed statutory grant of authority to the Commission to consider broader questions, such as the constitutionality of must-carry. Not surprisingly, the commenters raising these broader issues for the first time since the *1993 Report and Order* fail to establish any basis for expanding the scope of this proceeding to encompass these issues. Furthermore, no commenters have addressed the point that the FCC also is restricted by the scope of the *Public Notice*, which specifically limits the inquiry to whether home shopping stations serve the public interest. ^{10/} Given the limited grant of authority by Congress and the nature of the *Public Notice*, this proceeding necessarily is restricted to the contentions raised in the now-abandoned CSC Petition for Reconsideration and the Commission’s limited requests to update the record.

imposes an unconstitutional burden); Comments of National Cable & Television Association (NCTA) in MM Docket No. 93-8, at 3-6 (July 18, 2007) (“NCTA Comments”) (arguing that must-carry should be denied to home shopping stations).

^{8/} See HSN Comments at 8-9 (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)).

^{9/} 47 U.S.C. § 534(g)(2).

^{10/} See, e.g., *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019-20 (3rd Cir. 1972) (holding an agency ruling invalid due to inadequate notice when there were material differences between the content of the public notice and the substance of the ruling).

B. The FCC Is Time-Barred From Reconsidering or Re-Opening the Record For This Proceeding

As set forth in the HSN Comments and in the comments of other participants, the Commission is time-barred from reconsidering or re-opening the record here. ^{11/} Congress authorized the Commission to act within a limited time period and the Commission did so. Those commenters that support reconsideration at this time fail to overcome the 270-day time restriction that Congress placed on the Commission. ^{12/}

In addition, as pointed out by HSN and other commenters, even if reconsideration were allowed under statute beyond the 270-day window, there is no basis for the Commission to reopen the factual record at this time. ^{13/} Those seeking reconsideration simply have failed to address or even acknowledge this issue in their comments.

III. EVEN IF THE COMMISSION RECONSIDERED ITS 1993 DETERMINATION, THE RECORD DEMONSTRATES THAT HOME SHOPPING STATIONS SERVE THE PUBLIC INTEREST

A. The First Amendment Slope is as Slippery as Ever

As noted in the HSN Comments, there is no basis in the First Amendment for treating one class of broadcasters, those offering a home shopping format, to additional burdens not imposed

^{11/} See HSN Comments at 7-9; *see also* Supplemental Comments of Shop NBC in MM Docket No. 93-8, at 3-10 (July 18, 2007); Comments of Cocola Broadcasting Companies, et al. in MM Docket No. 93-8, at 15-18 (July 18, 2007) (“Cocola Comments”).

^{12/} Many supporters do not even reference the 270-day deadline. Others, while acknowledging the timeline, fail to establish any legal basis for the Commission’s ability to proceed. *See* Comments of Campaign Legal Center, *et al.* in MM Docket No. 93-8, at 6 (July 18, 2007) (noting that the Commission came to its first decision within the required 270-day period, yet arguing that the Commission should nonetheless reconsider based on the changed circumstances and allegations of *ex parte* communications).

^{13/} *See, e.g.*, Cocola Comments at 16 (asserting that data regarding the current state of home shopping programming in 2007 would not be rationally connected to the 1993 decision); Comments of Electronic Retailing Association in MM Docket No. 93-8, at 8 (July 18, 2007) (noting that the Commission’s own rules provide only limited exceptions to the general prohibition against the introduction into the record of new evidence during reconsideration).

on any other class of broadcasters solely on the content of the programming they offer. ^{14/} In its *1993 Report & Order*, the Commission cautiously veered from heading down a constitutionally-hazardous road by avoiding a subjective evaluation of programming content. ^{15/} Nothing in the interim 14 years justifies a change in course. ^{16/}

As set forth in many comments filed here, the Commission cannot engage in unconstitutional value judgments. ^{17/} Even if the issues associated with content-based regulations were surmountable, vagueness problems would arise in the application of such regulations, when the Commission would be forced to attempt to distinguish between what is and what is not “commercial” programming, as commenters have pointed out. ^{18/}

^{14/} See HSN Comments at 13.

^{15/} See *1993 Report & Order* at 5329 [¶ 39].

^{16/} See *Turner Broadcasting System, Inc. v. Federal Communications Commission* (“*Turner I*”), 512 U.S. 622, 643 (1994). See also *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (citing *Turner I*’s general rule that “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based”); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2nd Cir. 2001) (citing *Turner I* for requirement that a valid content-neutral regulation be unrelated to the “suppression of free expression”); *Prete v. Bradbury*, 438 F.3d 949, 968 n. 24 (9th Cir. 2006) (referencing *Turner I* for importance of whether regulation is based on “agreement or disagreement with the message it conveys” when determining whether to apply intermediate scrutiny). The Commission’s *1993 Report and Order* predated the *Turner* decisions, so that, when the Supreme Court reviewed must-carry, home shopping stations were, along with other broadcast stations, afforded must-carry rights. Consequently, it is perplexing how NCTA sees *Turner* as new law undermining must carry rights for home shopping stations. Cf. NCTA Comments at 3-4.

^{17/} See, e.g., Comments of Trinity Christian Center of Santa Ana, Inc. in MM Docket No. 93-8, at 5 (July 18, 2007) (“Trinity Comments”) (“[I]f the Commission concludes that it should impose new regulations on broadcasting licensees based on their home shopping programming, how can it proceed without risking violence to the First Amendment and its limiting principles?”); Comments of Reading Broadcasting, Inc. in MM Docket No. 93-8, at 5-6 (July 18, 2007) (“Reading Comments”) (“Injecting this content-based distinction into the Cable Act would place the must-carry rules in peril”); Comments of Multicultural Television Broadcasting, LLC in MM Docket No. 93-8, at 3-10 (July 18, 2007) (“Multicultural Comments”).

^{18/} Trinity Comments at 15-17 (noting the constitutional problems that arise when a standard is vague); HSN Comments at 11-13 (no cogent distinctions between product promotion and home shopping, “commercial” and “entertainment” programming).

None of the commenters seeking reconsideration of the *1993 Report & Order* have offered any solutions to address these significant constitutional issues. ^{19/} Notably, none of the commenters seeking reconsideration have suggested a constitutionally-viable definition of what kind of “commercial” content would be *too* commercial for a commercial television licensee to broadcast. Attempts by some commenters ^{20/} to justify action based upon the “fit” between the rationale underlying the Supreme Court’s acceptance of must-carry, generally, and home-shopping, specifically, fail to address the constitutional standards that this form of action requires. It is illogical to argue for a “content-based exception” to a “content-neutral regulation.” The subjective preference for certain forms of programming ^{21/} simply is insufficient to justify a content-based regulation. As noted by many commenters, ^{22/} and as the Commission itself concluded in 1993, ^{23/} the Commission cannot distinguish rights based on a licensee’s programming decisions.

^{19/} See, e.g., *Sable Communications of California, Inc. v. Federal Communications Commission, et al.*, 492 U.S. 115, 126 (1989) (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (requiring proof that regulation is necessary to further “compelling government interest” and “narrowly drawn” when regulation creates a disincentive to publish works of a specific content).

^{20/} See, e.g., NCTA Comments (arguing that there is not a great fit between the general benefits that the Supreme Court found sufficient to justify must carry in *Turner Broadcasting Inc. v. FCC*, 520 U.S. 180 (1997), and stations that air home shopping programming); Cablevision Comments (arguing that the carriage of home shopping programming is not narrowly tailored and does not further an important government interest).

^{21/} See, e.g., Comments of Free Press in MM Docket No. 93-8, (July 18, 2007) (ironically-named group “Free Press” would penalize broadcasters with restrictive conditions based on editorial choices).

^{22/} See, e.g., Reading Comments at 5 (citing *Applications of Abacus Broadcasting Corp. For Renewal of License of Station KJQN-FM (95.5 MHz), Ogden, Utah and Rees Broadcasting, Inc. For a Construction Permit for a New FM Station on 95.5 MHz at Ogden, Utah*, 6 FCC Rcd 7182 at ¶ 2 (Aud. Serv. Div. 1991) (“the First Amendment to the U.S. Constitution and § 326 of the Communications Act of 1934, as amended, prohibit the Commission from censoring broadcast material or interfering with the licensee’s discretion in selecting and broadcasting particular programming”); *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 603 (1981) (“We decline to overturn the Commission’s Policy Statement, which prefers reliance on market forces to its own attempt to oversee format changes at the behest of disaffected listeners”)).

B. The Record Establishes that Home Shopping Stations Serve the Public Interest

The value of home shopping programming is evidenced by the significant number of stations carrying home shopping programming, as shown in surveys submitted by commenters. ^{24/} As the Community Broadcasters Association has told the Commission, “[i]f home shopping programming were of no interest to the public, no one would watch it, and stations would stop carrying it. Since stations are compensated on the basis of sales made, it is clear that the public is watching and finds [home shopping services] desirable.” ^{25/}

Testimonials from viewers that were submitted into the record in 2007 are further evidence that home shopping stations continue to provide the numerous public interest benefits that the Commission recognized 14 years ago. ^{26/} Home shopping programming is especially valued by viewers with specialized needs (*e.g.*, the disabled, the elderly, and the homebound), viewers that live in areas with limited retail options, viewers who do not own cars or have access to other transportation, viewers who simply dislike in-store shopping, and viewers who lack the time to

^{23/} See 1993 Report and Order at 5329 [¶39] (“[W]e agree ... that the failure to qualify certain licensed stations based upon their programming decisions would place the content-neutrality of the must-carry rules into serious doubt, thereby jeopardizing their constitutionality”).

^{24/} See, *e.g.*, Comments of Members of the Children’s Media Policy Coalition in MM Docket No. 93-8, at Appendix 1 (July 18, 2007); HSN Comments at Attachment 2. Because there is no definitive listing of stations providing home shopping programming, commenters have provided a range of figures to the Commission based on the use of different resources and methodologies. In the HSN Comments, HSN explained that its survey included full power, low power, and Class A stations only in the top 100 markets that are broadcasting home shopping programming more than 86 hours per week. HSN did not include paid programming, such as infomercials, in its study. Therefore, as HSN stated in its HSN Comments, its survey data is a conservative estimate of the actual number of stations to which Section 4(g) is applicable. See HSN Comments at n. 83.

^{25/} Report of Ex Parte Communication in MM Docket No. 93-8 (July 20, 2007) (reporting on a presentation made by representatives of the Community Broadcasters Association to certain members of the Commission’s staff).

^{26/} See, *e.g.*, Comments of WQED Multimedia in MM Docket No. 93-8, at Exhibit A (July 18, 2007) (“WQED Comments”); HSN Comments at Exhibits B and C.

shop. 27/ No commenter has provided the Commission even a modicum of evidence that contradicts these clear facts.

Nor is the Internet a substitute for over-the-air home shopping programming. Home shopping programming on television provides shop-at-home options to those who may be uncomfortable with e-commerce or have limited Internet access, such as the elderly. 28/ Home shopping programming on television helps bridge the digital divide.

Furthermore, commenters have provided the Commission with information on a number of other ways that the home shopping format contributes to the public interest. As some commenters have demonstrated, home shopping formats serve the public interest by providing revenue to small and marginal stations, many of which invest such supplemental income into supporting a variety of important public interest activities within their local communities, including production of local public affairs programming. 29/ Also, as commenters have documented, the home shopping format enables small and marginal stations to survive the television marketplace without the immediate need to develop a complete schedule of programming, which is expensive and can be difficult to obtain for stations with limited financial resources and a lack of negotiating leverage. 30/ With financial viability secured by the anchor of home shopping programming, these

27/ See, e.g., WQED Comments at 2-5.

28/ See, e.g., Reading Comments at 9 (noting that even though the Internet has provided individuals in recent years with a new way to shop at home, the home shopping portion of Reading's income has over the last 14 years nevertheless increased).

29/ See, e.g., Reading Comments at 9-11 (providing examples of how it uses home shopping revenue to produce high quality and informative public affairs programming). See also WQED Comments at 6 (explaining that it uses home shopping revenue generated by its television station WQEX to support the operations of WQED, Pittsburgh's only public television station, and WQED-FM, a non-commercial educational radio station).

30/ See, e.g., Reading Comments at 11.

independent stations, like any other, use their editorial discretion to determine how to address the needs, interests and concerns of their communities. 31/

V. CONCLUSION

For the foregoing reasons, as a matter of process under the Cable Act, under its administrative duties pursuant to the Administrative Procedure Act, and to be consistent with the constitutional guarantees in the First Amendment, the Commission must affirm its *1993 Report & Order* and deny the Petition for Reconsideration.

Respectfully submitted,

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31/ See, e.g., WQED Comments at 7-8 (providing examples of the station's dedication to covering issues important to its community); Multicultural Comments at 10 (noting that home shopping format revenue affords broadcasters such as itself "the ability to enter the television marketplace, and to develop and distribute programming designed to meet the needs and interests of presently underserved groups...").